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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of JAMES and DELORES
MOSSBARGER.

JAMES MOSSBARGER,

Appellant,

v.

DELORES MOSSBARGER,

Respondent.

C040162

(Super. Ct. No.
96FL06188)

James Mossbarger (Husband) appeals following a judgment of dissolution of marriage from Delores Mossbarger (Wife). Husband argues the trial court erred by ordering the sale of the marital residence prior to dissolution. Since the order was based on a stipulation of the parties to sell the residence, we shall affirm.

Husband filed a petition for dissolution of marriage in September 1996.

In December 1997, the court ordered that Wife would have exclusive control of the marital residence while Husband would make payments thereon.

In January 1999, Husband moved to modify the December 1997 order. He asked to be relieved of making payments on the marital residence because Wife had recently refused to list the property for sale, and that even when it was listed, she imposed numerous restrictions on the ability of realtors to show the property.

Wife responded: The property had been listed for sale from September 1996 through January 1998, but there were no offers due to a slow market; the house was taken off the market in January 1998 because Husband refused to re-list it; the only restrictions on showing the home imposed by Wife were reasonable; realtor Joyce Forkum has agreed to re-list the house for \$279,000.

Husband replied: It was true Husband wanted the house off the market in January 1998, but only for a 30-60 day period; under the terms of a proposed settlement with Wife she would vacate the residence by April 1, 1998, and Husband would move in and sell it; in July 1998 it became clear this would not happen, so Husband asked Wife to re-list the property, but she refused.

During the time these papers were being exchanged, the parties agreed to re-list the marital residence with realtor Joyce Forkum. During the first week of February 1999, the parties signed a listing agreement on the marital residence.

The term of the listing agreement commenced February 1, 1999, and ended May 1, 1999.

On February 10, 1999, the Husband's modification motion came on for hearing. The parties reached a stipulation regarding the sale of the marital residence. Their stipulation was made part of a court order filed in March 1999. The order recites: "1. That the community residence is ordered to be sold pursuant to the existing listing agreement with Joyce [Forkum] dated February 1, 1999. Both parties are ordered to cooperate in selling the residence, as well as share in ordinary costs of repair and maintenance"

In September 1999, Wife moved for an order enforcing the order to sell the marital residence.

The court granted the motion in October 1999, reaffirming its March 1999 order to sell the marital residence, and specifying that the property would be re-listed with Joyce Forkum.

In February 2000, Wife filed an order to show cause to compel Husband to execute documents that would complete the sale of the residence. Wife declared that third parties had offered \$270,000 for the marital residence, but that Husband had interposed numerous objections to the sale.

The court granted Wife's motion.

In April 2000, Husband filed a petition for alternative writ in this court to block the sale of the residence.

(*Mossbarger v. Superior Court* (filed Apr. 3, 2000) C035243.) We

summarily denied the petition. (*Mossbarger v. Superior Court* (filed Apr. 20, 2000) C035243.)

Thereafter the residence was sold to the third parties.

Husband contends the court erred by ordering the sale of the marital residence prior to dissolution. He relies in part on Family Code section 2550, which provides, in pertinent part, that the court shall divide community property in its judgment of dissolution, "[e]xcept upon the written agreement of the parties, or on oral stipulation of the parties in open court"

It can be seen that this statute provides not only the rule upon which Husband relies, but the exception which he seeks to avoid, for in the present case, it would appear that the parties agreed that the marital residence would be sold by virtue of their stipulation entered on February 10, 1999.

As noted above, that stipulation, as recited in the court's order, provides: "1. That the community residence is ordered to be sold pursuant to the existing listing agreement with Joyce [Forkum] dated February 1, 1999. Both parties are ordered to cooperate in selling the residence, as well as share in ordinary costs of repair and maintenance"

Husband argues: "On February 10, 1999, the parties stipulated to a court order that the property would be sold by realtor Joyce Forkum pursuant to the terms of the listing agreement that existed at that time. That listing agreement expired by its own terms on May 1, 1999 The parties

never entered into an unconditional stipulation ordering that the home be sold."

We think Husband's interpretation of the stipulation is a bit crimped. If the stipulation said only "[t]hat the community residence is ordered to be sold pursuant to the existing listing agreement with Joyce [Forkum] dated February 1, 1999," it would be arguable that the obligation to sell was limited to the term of Forkum's listing. But the second sentence -- "Both parties are ordered to cooperate in selling the residence, as well as share in ordinary costs of repair and maintenance" -- strongly suggests the parties contemplated that their obligation to sell the marital residence extended beyond the limited term of Forkum's listing. Even if we were to assume Husband's interpretation of the language of the stipulation were plausible, it is also worth recalling that the stipulation was reached as a partial resolution of Husband's January 1999 motion to modify. Both the moving and responsive papers filed in connection with that motion discussed the parties' efforts toward selling the marital residence in the past and the parties' desires to sell it in the future. In that context, the second sentence of the stipulation reflects the parties' agreement to cooperate in the future to consummate the sale. At a minimum, it suggests the parties were obliged to negotiate a new listing agreement, and if they could not agree, that the court would decide for them, as it did here.

"A principle of construction well settled is that where one construction would make a contract unusual and extraordinary,

and another construction, equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." (*Stoddart v. Golden* (1919) 179 Cal. 663, 665; *Southern Surety Co. v. Bank of Lassen Co.* (1931) 118 Cal.App. 149, 154; *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 513; cf. *Jackson v. Puget Sound Lumber Co.* (1898) 123 Cal. 97, 100 [stipulations governed by rules governing contracts].)

In sum, the circumstances leading to the stipulation and the language of the stipulation itself lead to one conclusion, and one conclusion only: The parties agreed to sell the marital residence, and to cooperate in doing so, without regard to a time limit.

The judgment is affirmed.

NICHOLSON, Acting P.J.

We concur:

RAYE, J.

HULL, J.